

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

SEP 20 2022

Nathan Ochsner, Clerk of Court

MICHAEL HSU	\$	
Movant	\$	
	\$	
V.	\$	Case No. 4:18CR000721-002
	\$	
UNITED STATES OF AMERICA	\$	
Respondent	\$	

PRO SE MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO VACATE, SET ASIDE OR CORRECT  
SENTENCE PURSUANT TO 28 U.S.C. § 2255

COMES NOW, MICHAEL HSU, Movant Pro se, in the above styled and  
numbered caused in support of the Motion to Vacate pursuant to  
28 U.S.C. § 2255 and would show the Court the following facts,  
circumstances, and point of law:

I. Introduction

Mr. Hsu asks this Honorable Court to Vacate his conviction and  
sentence on the basis that his guilty plea was the result of gross  
misadvice, constituting ineffective assistance of counsel. Counsel  
misadvised Mr. Hsu as to the consequences of his guilty plea and that

the Presentence Investigation Report could change the outcome of his sentence after he plea guilty. Counsel did not go over the PSI with Mr. Hsu nor did he allow Mr. Hsu to review the PSI within timely fashion. Mr. Hsu only seen the PSI one day before sentencing and at that time Counsel did not go over the PSI with him. Counsel failed to investigate the case to familiarize himself with the fact of the case in order to prepare for sentencing. This is true because the Government made a misstatement of fact at sentencing about Mr. Hsu paid \$3,000 to Justin Kees to introduce some one to Mr. Hsu to do future drug transactions in order to establish that Mr. Hsu would qualify for leadership role. Counsel failed to object to that misstatement of fact. The record clearly states that the Government's investigator paid the CS \$3,000 to pay Justin Kees to introduce him to Mr. Hsu to discuss future drug transactions. Mr. Hsu was prejudice by Counsel failure to object to the Government misstatement of fact resulted in the Court granting the leadership role and moreover, the leadership role affected Mr. Hsu safety value qualification..Based on Counsel's representation and pre plea advice whether to plea guilty or not was erroneous resulting in Mr. Hsu entering a Plea of guilty unknowingly, involuntarily. The conviction and sentence should be vacated and Mr. Hsu returned to the pre-plea stage of proceedings in the case.

## II. JURISDICTION

Pursuant to 28 U.S.C. §2255, "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ... or is otherwise subject to collateral collateral attack, may move the court which imposed sentence to vacate, set aside, or correct sentence." Mr. Hsu so moves this Court on grounds that his sentence was imposed and his conviction obtained as a result of proceedings wherein he was denied the effective assistance of counsel.

## III. REVIEW STANDARDS

A motion for relief under Section 2255 follows the procedures established by the "Rules Governing Section 2255 Cases in the United District Courts" ("Rules"). The text of §2255 states that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of

fact and conclusions of law with respect thereto." Similarly, the Rules dictate that, upon initial consideration by the assigned District Judge, a §2255 motion should be dismissed only "if it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief". In all other cases, "the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take action the judge may order". The Rules authorize, where appropriate and by order of the Court, discovery proceedings, an expansion of the record, and an evidentiary hearing.

Subsequent to the "Preliminary Review" stage set out in Rule 4, the ultimate legal standard for motions brought pursuant to §2255 is prescribed by statute:

If the court finds that...the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.

#### IV. GROUND FOR RELIEF

##### A. GROUND ONE:

Mr. Hsu's Plea was not knowingly, Voluntarily and Intelligently Entered as Result of Ineffective Assistance of counsel.

1. Counsel's erroneously Pre-Plea Advice to Plea Guilty and Plea Agreement that contained a Waiver of Appeal.
2. Counsel failure to discuss the PSR with Mr. Hsu prior to sentencing.
3. Counsel failure to Investigate the Instant case.
4. Counsel failure to advise Mr. Hsu that the PSR could apply sentencing Enhancements that would raise his sentencing guideline range.
5. Counsel failed to object to the Government mis-statement of fact at sentencing.
6. Counsel failed to file a motion for down variance based on the sentencing disagreement policy as requested by Mr.Hsu

##### [1]. The Applicable Standard

In Hill V. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985), the Supreme Court held that the two-part set forth in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), applies to cases involving guilty pleas. To prevail on a claim of ineffective assistance of counsel, Mr. Hsu must show that Counsel's actions fell below an objective standard of reasonableness and that he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668 S.Ct. 2052, 80 L.Ed 2d 674 (1984); Martin v. Cain, 246 F.3d 471, 477 (5th Cir. 2001).

In context of this claim, the prejudice showing require that Mr.Hsu "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead he would have insisted on going to trial. Hill, 474 U.S. at 59 (1985). The Supreme Court recently clarified that this requirement is not contingent on the defendant having a reasonable defense, or

of acquittal, because the error which is being remedied is the denial of the entire judicial proceedings... to which he had a right. Lee V. United States, 137 S.Ct. 1958, 1965 (2017).

[2]. Deficient Performance

Counsel was deficient for failing to investigate the instant case. The record will reflect that counsel's actions at sentencing, he was not aware of the contents of the PSR or the investigation based on the Government's argument at sentencing when it stated that Mr.Hsu paid Justin Kees \$3,000 to interduce some one to him to start drug transactions. This was in order to seal the leadership role to show the Court that Mr.Hsu has others working for him. The record clearly states that the Government's investigator arranged the \$3,000 to be paid to Justin Kees to introduce him to Mr. Hsu in order to purchase drugs. Counsel's failure to set the record straight was based on he was not familiar with the investigation or the instant case.

Mr. Hsu Plea was not knowingly, voluntarily and intelligently entered as a result of ineffective assistance of counsel. Mr. Hsu, a particularly vulnerable defendant, to accept the United States plea offer based on counsel's erroneous factual and legal understanding

of his options, fell below the minimum level of competence, required of an attorney representing a criminal defendant, and was professionally unreasonable.

Controlling precedent mandates that, where the issue is whether to plea guilty or not, "the attorney has a duty to advise the defendant of the available option and possible consequences" resulting from the decision. *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1980).

Here, Mr. Hsu was deprived of such truthful and accurate advice and pleaded guilty based on a fundamental misunderstanding of his sentence exposure under the offer, resulting from the lack of truthful and accurate advice from counsel.

"[F]amiliarity with the structure and basic content of the guidelines...has become a necessity for counsel who seek to give effective representation." *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) (citations and internal quotations omitted). " A situation in which a defendant is induced by deception, an unfulfillable promise, or misrepresentation to enter a plea of guilty does not meet the standard for voluntariness articulated by the Supreme Court. Such renders a plea involuntary." *United States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997).

"Whether lawyers get the Guidelines wrong by misinterpreting the implications of a particular provision...such a drastic misstep clearly satisfies Strickland's first test: They amount to errors'so serious that counsel was not functions as the 'counsel' guaranteed by the Sixth Amendment." Soto, 132 F.3d at 59. Further, "counsel's failure to understand the basic mechanics of the sentencing guidelines and, in particular, failure to advise [the defendant] regarding the impact... amounted to ccnstitutionally deficient performance under Strickland." United States V. Washington, 619 F.3d 1252, 1253(10th Cir. 2011). And, "[a]n attorney who underestimates his client's potential sentencing exposure...performs deficiently because he dces not provide his client with the information needed to make an informed decision about accepting a plea offer or going to trial."

[3]. Prejudice

Absent counsel's misadvise, there is a reasonable probability that Mr. Hsu would have persisted in his plea of not guilty and~~ll~~ he proceeded to exercise his right to a trial by jury. Mr. Hsu only pleaded guilty as a result of counsel's misadvice which convinced



to accept the plea agreement. Mr. Hsu did not know that the waiver would bar him from appealing the enhancements if the Court disagrees with counsel's arguments. Counsel failed to explain this portion of the waiver of the right to appeal. Counsel further stated that he is only getting paid \$10,000, he gets \$100,000 for cases like this. Therefore, Counsel denied Mr.Hsu representation to the best of his ability. Based on the above errors of counsel's representation Mr. Hsu was denied a fair trial.

If Counsel would have fulfilled his duty as any reasonable attorney would have the outcome would have been different because Mr. Hsu would have went to trial. Counsel did not explain relevant conduct to Mr. Hsu and how it applies to his guilty plea and sentence. Without any explaining about Mr.Hsu's case, Counsel said you should plea guilty. Mr.Hsu does not have any legal training in the legal field, therefore, he relied on his counsel for legal advice. Counsel's representation was very poor or he just disregarded Mr.Hsu best interest. Mr.Hsu is now left to this court to order an evidentiary hearing on the issues raise out side of the record on ineffective assistance of counsel.

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## SENTENCE DISPARITY

Mr. Hsu was sentenced to 222 months in federal prison for actual/ice Methamphetamine. The sentencing disparity in methamphetamine actual/ice and methamphetamine mixture. If Mr. Hsu would have been sentenced for methamphetamine mixture he would have received a sentence of 152 months. There is a sentencing policy disagreement with methamphetamine has become an issue with other courts including Texas court. Mr. Hsu asks this Court to reconsider his sentence based on the following;

This is a quote from District Judge Terry R. Means wrote in United States V. Flores, No 4:15-CR-034 (Aug. 27, 2015):

I intent to count meth and meth actual the same, because you're talking about the same exact ingredient. All of the methamphetamine being taken now is 90 something percent or 80 something percent. **There is no real rational basis for the differentiation any more.** So it will be my habit... to conclude that this differentiation is just irrational or more than the crack and power cocaine differentiation we had for years.

The conclusion from United States V. Harry 313 F.Supp. 3d 369;2018 U.S. Dist. LEXIS 94853; This is a quote from Judge, Leonard T. Strand, Chief Judge's conclusion:

Because I have a policy disagreement with actual (and Ice) methamphetamine Guidelines, I grant **Harry's request for a down** variance on that issue, concluding that a sentence within the guidelines range of 360 months to life would be greater than necessary to comply with the sentencing purpose set forth in 18 U.S.C. § 3553(a).

Instead, and for all of the [2018 U.S. Dist. LEXIS 17] reasons set forth above and described on the record, concluded Harry should be committed to the custody of the Bureau of [313 F. Supp. 3d 976] prison for a period of 280 months. followed by 10-year term of supervised release.

Here is a recent introduction from United States District Judge, B. Lynn Winmill: United States V. House case No. 1:21-cr-00208-BLW decided February 2, 2022 U.S. LEXIS 20687:

The united States Sentencing Guidelines were designed to promote the twin goals of uniformity and proportionality in sentencing. The task was not easy to achieve, and efforts have continued to identify and eliminate sources of unwarranted disparities in federal sentencing. I write here to join serveral colleagues in expressing my belief that the **methamphetamine Guidelines** contain one such unwarranted disparity. 1. Due to increases in the average purity of methamphetamine sold today, purity is no longer an accurate indicator of a defendant's culpability or role in a drug enterprise, and the presumptive purity assigned to untested drugs does not reflect market realities. Moreover, whether a substance was lab tested for purity can have an arbitrary and unwarranted effect on the sentence imposed. The result is a scheme undermines [2022 U.S. Dist. LEXIS 2] the sentencing goals laid out in 18 U.S.C. §3553(a).

Based on the above this Court should exercise its wide discretion and reduce Mr. Hsu sentence to avoid sentence disparities between this methamphetamine actual/ice and methamphamine mixture.

### EVIDENTIARY HEARING

Because the motion and the files and records of the case do not conclusively show that Mr.Hsu is entitled to no relief, the court shall...grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. 28 U.S.C. § 2255(b)

### CONCLUSION

Based on the foregoing, the Court should grant Hsu § 2255 relief.

A handwritten signature in cursive script, appearing to read "Michael Hsu", is written over a horizontal line.

MICHAEL HSU # 78113-479

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